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No. 03-1027

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN, AS NEXT
FRIEND OF JOSE PADILLA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
PAUL D. CLEMENT
Deputy Solicitor General
SRI SRINIVASAN
DAVID B. SALMONS
Assistants to the Solicitor General
JONATHAN L. MARCUS
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

2. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. 4001(a) precludes that exercise of Presidential authority.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is reported at 352 F.3d 695. The opinion of the district court (Pet. App. 76a-166a) is reported at 233 F. Supp. 2d 564.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2003. The petition for a writ of certiorari was filed on January 16, 2004, and was granted on February 20, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 18 U.S.C. 4001, 10 U.S.C. 956(5), and the President's order that Jose Padilla be detained as an enemy combatant are reprinted in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained on any one day in the Nation's history. That morning, agents of the al Qaeda terrorist network hijacked four commercial airliners loaded with passengers and jet fuel and flew the planes as missiles towards targets in the Nation's financial center and seat of government. Two of the planes struck the World Trade Center office towers in New York City just as the business day began, and a third hit the headquarters of the Department of Defense at the Pentagon. The fourth was brought down in Pennsylvania by its passengers before it could reach its target, presumed to be the United States Capitol or the White House. The

September 11 attacks killed approximately 3000 persons, exceeding the loss of life inflicted at Pearl Harbor. The attacks also caused injury to thousands more persons, destroyed hundreds of millions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President, acting as Commander in Chief, took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Authorization of Force or Authorization) (App., *infra*, 1a-2a). Congress emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Preamble, 115 Stat. 224.

The President ordered the armed forces of the United States to Afghanistan to subdue the al Qaeda terrorist network and the Taliban regime that supported it. In the course of those ongoing operations, United States and coalition forces have removed the Taliban from power, eliminated the "primary source of support to the terrorists who viciously attacked our Nation on September 11, 2001," and "seriously degraded" al Qaeda's training capabilities. Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 19, 2003) <www.whitehouse.gov/news/releases /2003/09/20030919-1.html>. Al Qaeda and the Taliban nonetheless remain a significant threat to United States and coalition forces. Moreover, Osama bin Laden has continued his call to al Qaeda and its supporters to maintain their war against the United States, and the United States and other nations

have been subject to attacks throughout the world. See, *e.g.*, *Tape urges Muslim fight against U.S.* (Feb. 12, 2003) <www.cnn.com/2003/ALLPOLITICS/02/11/powell.binladen/index.html>. See also *Qaeda Tapes Taunt U.S., France* (Feb. 24, 2004) <www.cbsnews.com/stories/2004/01/04/terror/main591217.shtml>. The continuing threat posed by al Qaeda is not confined to the United States' interests abroad. Rather, as Congress recognized in its Authorization of Force, it is imperative "to protect United States citizens both at home and abroad," and there remains a serious risk of future terrorist attacks carried out as were the attacks of September 11: by al Qaeda combatants who infiltrate the borders of the United States.[1]

2. In the context of both the removal of the Taliban from power and in the broader efforts to dismantle the al Qaeda terrorist network, the United States, consistent with the Nation's settled historical practice in times of war, has seized and detained numerous persons fighting for and associated with the enemy during the course of the ongoing military campaign. Jose Padilla, a.k.a., Abdullah Al Muhajir, is being

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[1] In a recent hearing before the Senate Armed Services Committee, the Director of the CIA testified that: al Qaeda "remains as committed as ever to attacking the US homeland"; al Qaeda "remains intent on obtaining, and using, catastrophic weapons"; "detainees consistently talk about the importance the group still attaches to striking the main enemy: the United States"; al Qaeda "remains interested in dirty bombs"; and "catastrophic attacks on the scale of 11 September remain within al Qa'ida's reach." *Current and Future Worldwide Threats to the National Security of the United States: Hearing Before the Senate Armed Services Comm.*, 108th Cong., 2d Sess. (2004) (statement of George Tenet) <www.senate.gov/~armedservices/statemnt/2004/March/Tenet.pdf>. A voice believed to be that of one of Osama bin Laden's top lieutenants warned in a recent audiotape: "Bush, fortify your targets, tighten your defense, intensify your security measures, because the fighting Islamic community—which sent you New York and Washington battalions—has decided to send you one battalion after another, carrying death and seeking heaven." *Qaeda Tapes Taunt U.S., France, supra.*

held by the military as an enemy combatant in connection with the conflict against al Qaeda.

a. On May 8, 2002, Padilla flew to Chicago from Pakistan, with an intermediate stop in Switzerland. Upon his arrival in Chicago, he was arrested pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York in connection with grand jury proceedings investigating the September 11 attacks. On May 15, 2002, after Padilla's transfer to New York City, the district court appointed respondent Donna R. Newman, Esq., as Padilla's counsel. Pet. App. 4a-5a.

On June 9, 2002, the President, expressly invoking both his constitutional authority as Commander in Chief and Congress's Authorization of Force, determined that Padilla "is, and at the time he entered the United States in May 2002 was, an enemy combatant." App., *infra*, 5a. The President found, in particular: that Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; that he has "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States"; that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda"; that he "represents a continuing, present and grave danger to the national security of the United States"; and that his detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.* at 5a-6a.

The President based his determination on information from sources directly connected with al Qaeda that Padilla is closely associated with al Qaeda and came to the United States to advance the conduct of terrorist operations on al Qaeda's behalf. See Pet. App. 167a-172a (8/27/02 Declaration

of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy) (Mobbs Declaration).[2] The information considered by the President evidenced that Padilla moved to Egypt in 1998 after his release from prison in the United States, and he subsequently became known as Abdullah Al Muhajir. Over the next three years, Padilla traveled to Pakistan, Saudi Arabia, and Afghanistan. During his time in the Middle East, Padilla was closely associated with the al Qaeda network and its leaders. *Id.* at 168a-169a.

While in Afghanistan and Pakistan during 2001 and 2002, Padilla had extended discussions with senior al Qaeda operatives concerning his conduct of terrorist operations within the United States. In Afghanistan during 2001, Padilla met with senior Osama bin Laden lieutenant Abu Zubaydah to discuss potential attacks on United States targets, including a plan to detonate a radiological dispersal device (or "dirty bomb") in the United States. Zubaydah directed Padilla to travel to Pakistan to receive training on the wiring of explosives, and Padilla researched explosive devices at an al Qaeda safehouse in Lahore. While in Pakistan during 2002, Padilla met on several occasions with senior al Qaeda operatives to further discuss planned terrorist operations within the United States, including the dirty bomb plan as well as other operations involving the detonation of explosives in hotel rooms and gas stations. At the direction of al Qaeda operatives, Padilla returned to the United States in May 2002 to advance the conduct of al Qaeda attacks against the United States. Pet. App. 169a-171a.

The President, acting on that information and pursuant to a formal finding, directed the Department of Defense "to receive Mr. Padilla from the Department of Justice and to

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[2] A classified version of the Mobbs Declaration providing additional detail concerning the determination that Padilla is an enemy combatant was submitted to the district court under seal and *ex parte*. The government has made arrangements with the Clerk of this Court to facilitate this Court's review of the classified declaration upon request.

detain him as an enemy combatant." App., *infra*, 6a. Upon issuance of the President's determination on June 9, 2002, the Department of Justice immediately asked the district court to vacate the material witness warrant. The district court vacated the warrant that day, and Padilla was transferred to military control and transported to the Naval Consolidated Brig, Charleston, South Carolina, for detention as an enemy combatant. Pet. App. 83a.

b. The President's determination to detain Padilla as an enemy combatant was the result of a careful, thorough, and deliberative process consisting of several layers of review. When a United States citizen is suspected of being an enemy combatant, the Office of Legal Counsel (OLC) in the Department of Justice makes an initial determination as to whether the individual, based on the information then available, satisfies the legal standard for enemy combatant status articulated by this Court in *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war."). See 150 Cong. Rec. S2701, S2703-S2704 (daily ed. Mar. 11, 2004) (reprinting Feb. 24, 2004 remarks of Alberto Gonzales, White House Counsel, before the American Bar Association's Standing Committee on Law and National Security). After that initial determination, the Director of Central Intelligence (CIA) conducts a thorough assessment of all available CIA intelligence information concerning the individual and makes a recommendation to the Department of Defense (DoD) as to whether the person should be taken into custody as an enemy combatant. The Secretary of Defense then makes his own independent assessment based on the information provided by the CIA and other intelligence information developed within DoD. The Secretary's assessment, along with the intelligence information from both the CIA and DoD, is provided to the Attorney General with a

request for the Attorney General's opinion concerning: (1) whether the assessment comports with applicable law; (2) whether the individual may lawfully be taken into custody by the Department of Defense; and (3) whether the Attorney General recommends as a matter of policy that such a course be pursued. In addition to the materials provided by the CIA and DoD, the Attorney General bases his opinion on a memorandum from the Criminal Division setting out all the information available to it from the FBI and other sources concerning the individual, and a formal legal opinion from OLC analyzing whether the individual meets the *Quirin* standard for enemy combatant status. 150 Cong. Rec. at S2704.

The Secretary of Defense then transmits a package of all the intelligence information and recommendations to the President, including (i) the assessment and recommendations of the CIA; (ii) the recommendation and preliminary assessment by the Secretary of Defense; (iii) the DoD intelligence information; (iv) the Attorney General's letter to DoD, including his legal opinion and recommendation; (v) the Criminal Division's fact memo; and (vi) the OLC opinion. Lawyers at the White House review the materials, and the Counsel to the President forwards the package to the President along with his written recommendation. Finally, the President reviews all the materials and is briefed by his Counsel. If the President concludes that the person is an enemy combatant, as he did in Padilla's case, the President signs an order to that effect directing the Secretary of Defense to take him into his control. See 150 Cong. Rec. at S2704.

3. a. Two days after Padilla's transfer to military control in South Carolina, on June 11, 2002, Padilla's counsel, respondent Donna R. Newman, filed a habeas petition in the district court challenging the legality of his detention. See J.A. 1-2. On June 19, 2002, respondent, styling herself as Padilla's next friend, filed an amended habeas petition on Padilla's behalf. J.A. 46-58. The amended petition names as respon-

dents the President, the Secretary of Defense, the Attorney General, and Commander Melanie A. Marr, Commanding Officer of the Naval Consolidated Brig, Charleston, South Carolina, where Padilla is being held. J.A. 3, 46. The amended petition alleges that Padilla's detention violates the Fourth, Fifth, and Sixth Amendments to the Constitution, as well as the Posse Comitatus Act, 18 U.S.C. 1385. J.A. 53-55. Neither the petition nor the amended petition mentions 18 U.S.C. 4001(a). As relief, the amended petition seeks, *inter alia*, Padilla's release from military control. J.A. 56.

On June 26, 2002, the government filed a motion to dismiss the amended petition for lack of jurisdiction, arguing: (i) that respondent Newman lacks standing as a next friend to file the amended petition on Padilla's behalf; and (ii) that the district court lacks territorial jurisdiction over the proper respondent to the amended petition—Commander Marr, Padilla's immediate custodian at the Naval Consolidated Brig, Charleston—such that the petition should have been filed in the District of South Carolina. On August 27, 2002, in response to the district court's direction to address the merits, the government filed a response to and motion to dismiss the amended petition on the merits. In connection with that motion, the government submitted the Mobbs Declaration setting forth the factual underpinnings of the President's determination that Padilla is an enemy combatant. Pet. App. 7a, 167a-172a.

b. On December 4, 2002, the district court issued an opinion and order resolving the jurisdictional claims and several of the issues on the merits. Pet. App. 76a-166a. On the jurisdictional issues, the court first ruled that respondent Newman had a sufficient relationship with Padilla to qualify as his next friend for standing purposes. *Id.* at 91a-97a. The court next addressed whether it has jurisdiction over the proper respondent to the amended petition. The court acknowledged that, "in the usual habeas corpus case * * * courts have held consistently that the proper respondent is

the warden of the prison where the prisoner is held." *Id.* at 98a. The court nevertheless held that Secretary Rumsfeld rather than Commander Marr is the proper respondent in this case, and further held that Secretary Rumsfeld is subject to the court's habeas jurisdiction pursuant to the New York long-arm statute. *Id.* at 98a-108a, 116a-117a.[3]

On the merits, the district court agreed with the government that the settled wartime authority of the Commander in Chief to capture and detain enemy combatants is fully applicable in the circumstances of this case. Pet. App. 119a-135a. The court relied principally on *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the exercise of military jurisdiction over German saboteurs (including one presumed to be an American citizen) who were captured within the borders of the United States during World War II before they could carry out plans to destroy United States war facilities. The court rejected respondents' invocation of 18 U.S.C. 4001(a), which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The court explained that Padilla's detention is "pursuant to an Act of Congress," because Congress's Authorization of Force broadly supports the application of military force to prevent future acts of terrorism by al Qaeda. Pet. App. 141a-142a. Accordingly, the court ruled, the "President * * * has both constitutional and statutory authority to exercise the powers of Commander in Chief * * * and it matters not that Padilla is a United States citizen captured on United States soil." *Id.* at 158a. While upholding the President's legal authority to detain Padilla, the court granted Padilla access to counsel pursuant to the All

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[3] The district court dismissed the President as a respondent, citing concerns about its authority "to direct the President to perform an official act." Pet. App. 106a-108a (discussing *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992)); accord *Al-Marri* v. *Rumsfeld*, No. 03-3674, 2004 WL 415279, at *1 (7th Cir. Mar. 8, 2004). Respondent raised no challenge on appeal to the dismissal of the President.

Writs Act, 28 U.S.C. 1651(a), in order to facilitate litigation of the habeas petition. Pet. App. 142a-155a.

c. On January 9, 2003, the government moved for reconsideration of that part of the district court's order directing that Padilla be afforded access to counsel. Pet. App. 8a; C.A. App. 154. The government submitted a sworn declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency, which explains the significant national security concerns raised by interposing counsel into the military's efforts to obtain vital intelligence from detained enemy combatants. J.A. 75-88. On March 11, 2003, the district court issued an opinion and order granting reconsideration but adhering to its previous disposition. Pet. App. 9a.

d. The district court granted the government's motion for an interlocutory appeal of its orders pursuant to 28 U.S.C. 1292(b), and the court of appeals accepted the parties' application for interlocutory review. Pet. App. 10a.

4. A divided panel of the court of appeals affirmed in part and reversed in part. Pet. App. 1a-75a.

a. The court first sustained the district court's assertion of habeas jurisdiction over the amended petition. Pet. App. 13a-26a.[4] In the court's view, although the general rule in habeas cases calls for naming the "immediate physical custodian as respondent," that rule need not apply in the case of a

[4] The court also found as a threshold matter that respondent Newman had established next-friend standing to file the amended petition on Padilla's behalf. Pet. App. 10a-13a. Next-friend standing arises when the detainee is inaccessible and thus unable to seek relief on his own behalf. See *Whitmore* v. *Arkansas*, 495 U.S. 149, 163 (1990). This Court has indicated that, to establish standing, "a 'next friend' must have some significant relationship with the real party in interest." *Id.* at 164. The government argued below that respondent Newman's limited interactions with Padilla before his transfer to military control were insufficient to establish a "significant relationship," and that Padilla's mother or other close relative should serve as next friend. Since the court of appeals' decision, the military has allowed Padilla access to respondent Newman. See note 5, *infra*. Because Padilla is no longer inaccessible, the petition can be amended on remand to convert it to a direct petition.

person "detained for reasons other than federal criminal violations." *Id.* at 15a. The court found Secretary Rumsfeld to be a proper respondent in this case, reasoning that "the legal reality of control is vested with Secretary Rumsfeld" because he "could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary." *Id.* at 20a. The court also rejected the government's contention that, in a challenge to a detainee's present, physical confinement, a district court's habeas jurisdiction is limited to the district's territorial boundaries. The court instead ruled that habeas jurisdiction extends to any respondent subject to suit under the long-arm statute of the state in which the district court sits. *Id.* at 21a-26a.

b. On the merits, the panel majority concluded that the President lacks legal authority to detain Padilla as an enemy combatant, and that he must be released from military control. Pet. App. 26a-55a. The court first held that "the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat." *Id.* at 29a. The court rejected the district court's reliance on *Quirin*, reasoning that *Quirin* involved congressional authorization absent in this case. *Id.* at 37a-38a. The court thus held that any authority to detain Padilla as an enemy combatant must come from Congress. *Id.* at 36a.

The majority next concluded that Congress had prohibited Padilla's detention in 18 U.S.C. 4001(a). Pet. App. 43a-55a. The court read Section 4001(a) to prohibit all detentions of United States citizens—including the wartime detention of enemy combatants by the military—except pursuant to specific statutory authorization. *Id.* at 43a. The court rejected the conclusion of the district court that Congress's Authorization of Force supplies a basis for Padilla's detention, reasoning that the Authorization does not encompass the detention of "American citizens seized on American soil and not actively engaged in combat." *Id.* at 51a.

The court remanded the case to the district court with instructions to issue a writ of habeas corpus directing Padilla's release from military control within 30 days. Pet. App. 55a. The court explained that its holding that the President lacks legal authority to detain Padilla "effectively moots arguments raised by both parties concerning access to counsel, standard of review, and burden of proof." *Id.* at 4a n.1.[5]

c. Judge Wesley dissented from the majority's conclusion that the President lacks legal authority to detain Padilla as an enemy combatant. Pet. App. 61a-75a. In Judge Wesley's view, "the President, as Commander in Chief, has inherent authority to thwart acts of belligerency on U.S. soil that would cause harm to U.S. citizens, and, in this case, Congress through the [Authorization of Force] specifically and directly authorized the President to take the actions herein contested." *Id.* at 62a. The majority's assumption that the Commander-in-Chief authority is confined to "zones of combat," Judge Wesley explained, entails the "startling conclusion" that the "President would be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention." *Id.* at 66a. In any event, Judge Wesley observed, Congress's Authorization of Force "was *not* limited in geographic scope" and "did not limit the President's authority to foreign theaters." *Id.* at 73a. In Judge Wesley's view, Congress "clearly recognized that the events of 9-11 signaled a war with al Qaeda that could be waged on U.S. soil." *Ibid.*

[5] Notwithstanding that the court of appeals' disposition "effectively moots" (Pet. App. 4a n.1) any issues concerning the process by which respondent may raise a factual challenge to the President's determination that Padilla is an enemy combatant—including whether Padilla is entitled to meet with counsel for that purpose—respondent argued in the brief in opposition (at 19-23) that the Court should grant review on such issues and should expand the questions presented correspondingly. This Court did not do so, instead granting certiorari without modifying the questions presented by the petition. Any issues concerning access to counsel or the extent to which respondent may raise a factual challenge thus are not properly before the Court. Moreover, as the government explained in its reply brief supporting the petition (at 7 n.6), on February 11, 2004, the Department of Defense determined that Padilla should be allowed access to counsel subject to appropriate security restrictions. See <www.defenselink.mil/ releases/2004/nr20040211-0341.html>.

SUMMARY OF ARGUMENT

I. This case raises fundamental questions about the authority of the Commander in Chief in a time of war, questions that should only be addressed by a court with jurisdiction to pass on them. The court of appeals erred in this case in holding that jurisdiction lies in the Southern District of New York over a habeas challenge to Padilla's present, physical confinement in South Carolina.

A. Under the terms of the habeas statutes, the proper respondent in a habeas challenge to present confinement is the person with day-to-day physical control over the detainee, *i.e.*, the immediate physical custodian. The court of appeals nonetheless ruled that the proper respondent in this proceeding is the Secretary of Defense rather than the Commanding Officer of the facility where Padilla is held, Commander Marr. The court based that conclusion on its perception that Secretary Rumsfeld has ultimate legal authority to determine the duration of Padilla's confinement. That approach contradicts the terms of the habeas statutes and the decisions of this Court, which dictate that the proper respondent is the person with physical custody of the detainee, not a supervisory official with legal control.

B. The habeas statutes confine district courts to issuing the writ "within their respective jurisdictions," 28 U.S.C. 2241(a), a limitation intended to prevent habeas courts from reaching custodians located beyond the territorial borders of the federal district in which the court sits. The court of appeals nonetheless ruled that a habeas petition may be filed in any district court that can reach the custodian under the forum state's long-arm statute. That conclusion cannot be

reconciled with the statutory direction that courts exercise habeas jurisdiction only "within their respective jurisdictions." Nor can it be squared with this Court's holding that the statute providing for nationwide service of process against federal officials fails to permit habeas courts to reach beyond their territorial jurisdiction.

II. The President made a determination as Commander in Chief and pursuant to Congress's Authorization of Force that Padilla is an enemy combatant closely associated with al Qaeda and should be detained as such in the course of the ongoing conflict. That decision falls squarely within the President's core constitutional powers in a time of war and within the authority conferred by Congress in the Authorization of Force. The long-settled authority of the Commander in Chief to seize and detain enemy combatants is not limited to aliens or foreign battlefields and is fully applicable in the circumstances of this case. See *Ex parte Quirin*, 317 U.S. 1 (1942).

The court of appeals fundamentally erred in invalidating Padilla's detention on the ground that Congress has failed to authorize the President to exercise his Commander-in-Chief powers over an American citizen captured in the United States. First, the President's inherent powers as Commander in Chief are substantially more robust than recognized by the court of appeals. The authority of the Commander in Chief to engage and defeat the enemy encompasses the capture and detention of enemy combatants wherever found, including within the Nation's borders. That is particularly true in the current conflict in view of the nature of the September 11 attacks, which were perpetrated by combatants who had assimilated into the civilian population and launched their attacks from within the United States.

Congress, in any event, through the Authorization of Force, broadly supported the President's use of "*all* necessary and appropriate force" against those responsible for the September 11 attacks "in order to prevent *any* future acts of

international terrorism against the United States." § 2(a), 115 Stat. 224 (emphasis added). The President's basic power to capture and detain enemy combatants necessarily falls within and is reinforced by the broad terms of Congress's authorization. Moreover, nothing in the Authorization suggests that Congress intended to withhold support for the President's exercise of Commander-in-Chief authority over combatants found within the Nation's borders. To the contrary, Congress acted against the backdrop of the decision in *Quirin* upholding the exercise of military jurisdiction over combatants seized in the United States, Congress was acting in immediate response to attacks carried out within the Nation's borders, and Congress specifically noted the need to "protect United States citizens both at home and abroad," Preamble, 115 Stat. 224.

Nothing in 18 U.S.C. 4001(a) suggests that the President lacks authority to detain Padilla as an enemy combatant. First, because the President explicitly acted pursuant to Congress's Authorization of Force, as well as his powers as Commander in Chief, Padilla's detention is "pursuant to an Act of Congress" within the meaning of Section 4001(a). In any event, Section 4001(a) applies only to the detention of citizens at the hands of *civilian* authority, not detentions of enemy combatants under the laws of war. Section 4001(a) repealed the Emergency Detention Act of 1950, which authorized detentions by the Attorney General. And the context surrounding Section 4001(a)'s enactment confirms that Congress was concerned exclusively with detention pursuant to civilian authority and had no intention to affect the long-settled authority of the military to detain enemy combatants, including those who are American citizens.

ARGUMENT

I. THE DISTRICT COURT LACKS JURISDICTION OVER THE PROPER RESPONDENT TO THE AMENDED HABEAS PETITION

This case presents questions of exceptional national significance concerning the authority of the Commander in Chief to wage the ongoing conflict against al Qaeda. The court of appeals' approach to those issues was seriously flawed and warrants reversal. But the court also erred as an antecedent matter in holding that the district court properly asserted jurisdiction over the amended habeas petition. In a case raising sensitive questions of the magnitude and character presented here, it is especially important that a court be assured of its jurisdiction lest it pronounce on the merits of such questions without any authority to do so. See *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 606-607 (4th Cir. 2002). That is what happened below.

The habeas statutes dictate, in the context of core habeas challenges to present, physical confinement, that the proceedings take place in the federal district of confinement. The habeas laws effectuate that territorial constraint through two complementary requirements. First, the detainee must bring his challenge to his present, physical detention against his immediate, on-site custodian rather than a supervisory official located in another, potentially far-removed district. Second, in such cases, a district court can issue the writ only within its territorial jurisdiction rather than reaching out to issue the writ against custodians located in other judicial districts. Those settled rules direct that the amended petition in this case should have been filed against Padilla's immediate custodian and heard in the District of South Carolina, not the Southern District of New York. The court of appeals misconceived both aspects of the jurisdictional inquiry.

A. The Proper Respondent To The Amended Habeas Petition Is Padilla's Immediate Physical Custodian, Commander Marr

1. The proper respondent in a habeas challenge to present, physical confinement is the person with day-to-day physical control over the detainee—*i.e.*, the immediate, on-site custodian, typically the warden or Commanding Officer of the facility. That settled rule is dictated by the terms of the habeas statutes. Those laws have long specified that the writ "shall be directed to *the person* having custody of the person detained." 28 U.S.C. 2243 (emphasis added); see Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386. The focus on "the person" with control over the detainee is reinforced by the requirements that the petitioner "allege * * * the name of the person who has custody over him," 28 U.S.C. 2242, and that, in appropriate situations, "the person to whom the writ is directed shall * * * produce at the hearing the body of the person detained," 28 U.S.C. 2243.

This Court established long ago that the proper respondent under those provisions is the detainee's immediate physical custodian. In *Wales* v. *Whitney*, 114 U.S. 564 (1885), upon reviewing the requirements that the writ be directed to "the person" with custody over the detainee and that the custodian be situated to bring the body of the detainee before the habeas court, the Court explained: "All these provisions contemplate a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Id.* at 574 (emphasis added). The Court has not departed from that understanding. See *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973) (citing *Wales* and observing that the "writ of habeas

corpus" acts upon "the person who holds [the detainee] in what is alleged to be unlawful custody").[6]

In accordance with this Court's direction, a long line of decisions in the courts of appeals holds that the proper habeas respondent in a challenge to present confinement is the detainee's immediate physical custodian. See, *e.g.*, *Robledo-Gonzalez* v. *Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688, 690-691 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Monk* v. *Secretary of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986); *Jones* v. *Biddle*, 131 F.2d 853, 854 (8th Cir. 1942), cert. denied, 318 U.S. 784 (1943). Those decisions reject claims that a supervisory official such as the Attorney General is a proper respondent, ruling instead that the proper custodian under the habeas laws is the warden or facility commander with day-to-day physical control. *E.g.*, *Vasquez*, 233 F.3d at 693; *Monk*, 793 F.2d at 369.

The Seventh Circuit recently applied that rule in a habeas action filed by a detained enemy combatant, rejecting the court of appeals' analysis in this case and holding unanimously that the proper respondent is the brig commander rather than the Secretary of Defense. *Al-Marri* v. *Rumsfeld*, No. 03-3674, 2004 WL 415279, at *2 (7th Cir. Mar. 8, 2004). The enemy combatant in that case, like Padilla and Yaser Esam Hamdi, see *Hamdi* v. *Rumsfeld*, No. 03-6696 (cert. granted Jan. 9, 2004), is being held at the Consolidated

[6] A separate aspect of the Court's decision in *Wales* concerned the circumstances in which a person is "in custody" within the meaning of the habeas laws. The Court has since expanded its understanding of the "custody" requirement. See *Hensley* v. *Municipal Court*, 411 U.S. 345, 350 n.8 (1973). The expansion of the notion of "custody" has enabled a habeas petitioner in some situations to challenge a form of custody other than his present, physical confinement. In *Braden*, for example, the Court permitted a habeas petition against a future detaining authority based on *Peyton* v. *Rowe*, 391 U.S. 54 (1968), which had overruled *McNally* v. *Hill*, 293 U.S. 131 (1934), and thereby relaxed the "custody" requirement so as to allow a challenge to "confinement that would be imposed in the future." *Braden*, 410 U.S. at 489; see pp. 20-21, *infra*.

Naval Brig, Charleston, South Carolina. See *Al-Marri*, 2004 WL 415279, at *1. The Seventh Circuit explained that "Commander Marr of the Naval Brig is Al-Marri's custodian. Secretary Rumsfeld is Marr's (remote) superior, and no more an appropriate respondent on that account than is the Attorney General when a convicted federal prisoner or an alien detained pending removal seeks a writ of habeas corpus." *Id.* at *2. Cf. 10 U.S.C. 951(c) (providing that Commanding Officer of military correctional facility "shall have custody and control" of persons confined in facility).

2. The court of appeals' contrary conclusion was based on a mistaken belief that the requirement to name the immediate custodian is inapplicable when the petitioner is "detained for reasons other than federal criminal violations." Pet. App. 15a. However, there is a single federal habeas statute for criminal and non-criminal detentions, and the terms of the statute require the writ to be directed to the person with day-to-day physical control over the detainee. Nothing in the relevant statutory language suggests any pertinent distinction between criminal and non-criminal detentions. See *Vasquez*, 233 F.3d at 693. In either case, the proper respondent is the "person having custody of the person detained," who is best situated to "produce * * * the body of the person detained" if necessary. 28 U.S.C. 2243.

The court of appeals also emphasized (Pet. App. 20a) that Secretary Rumsfeld owns "the legal reality of control" because he is in a position to advise the President concerning when Padilla's detention as an enemy combatant may no longer be necessary. But that argument does not distinguish this case from any other habeas proceeding: *no* prison warden or facility commander has independent authority to determine the duration of a detainee's confinement. As the Seventh Circuit explained in *Al-Marri*, "there is a difference between authorizing and exercising custody." 2004 WL 415279, at *1. A host of officials from the sentencing judge to the prosecutor may play a role in determining the length of a

detainee's confinement, but "for an inmate of a brig, jail, or prison, the 'custodian' is the person in charge of that institution." *Id.* at *1.

3. The court of appeals erroneously viewed this Court's decisions in *Braden*, 410 U.S. at 484, and *Strait* v. *Laird*, 406 U.S. 341 (1972), as signifying a general relaxation of the requirement to name the immediate physical custodian. Pet. App. 16a-20a. But those cases involve challenges to a form of custody other than present, physical confinement. They do nothing to suggest a deviation from the immediate custodian rule in the context of a classic habeas challenge to ongoing physical detention. See *Jones* v. *Cunningham*, 371 U.S. 236, 238 (1963) ("[T]he chief use of habeas corpus has been to seek the release of persons held in actual, physical custody.").

The petitioner in *Braden* was confined in Alabama for an Alabama conviction but was also subject to a detainer lodged by Kentucky officials based on an outstanding Kentucky indictment. Because the habeas challenge was to the petitioner's legal custody under the Kentucky detainer rather than his present, physical custody in Alabama, the Court upheld the filing of the petition in Kentucky, the location of the relevant custodian. See 410 U.S. at 499-500; *Hensley*, 411 U.S. at 351 n.9 (petitioner in *Braden* "was in the custody of Kentucky officials for purposes of his habeas corpus action"). *Braden* thus affords no grounds for deviating from the well-settled rules governing a habeas challenge to present, physical confinement. Such a challenge must be brought against the on-site, immediate custodian in the district of confinement.[7]

[7] See *Al-Marri*, 2004 WL 415279, at *5 (explaining that reading *Braden* to relax the immediate custodian rule is a "non sequitur," and that "when there is only one custody and one physical custodian, that person is the proper respondent, and the district in which the prison is located the proper district"); *Monk*, 793 F.2d at 369 ("[n]othing in *Braden* supports" departing from immediate custodian rule).

The Court's decision in *Strait* v. *Laird*, *supra*, is inapposite for essentially the same reasons. That case involved an unattached military reservist seeking discharge from a service obligation as a conscientious objector. An unattached reservist is not subject to physical confinement or to the day-to-day physical control of any custodian. See 406 U.S. at 344-345. Where physical confinement is not in issue, the requirement to name as respondent "the person having custody of the person *detained*" (28 U.S.C. 2243 (emphasis added)) by definition is not an immediate physical custodian. It therefore "is necessary to identify as a 'custodian' someone who asserts the legal right to control that is being contested in the litigation." *Al-Marri*, 2004 WL 415279, at *5. The need to select a nominal custodian in those circumstances does not mean that, in a challenge to present, physical confinement, the detainee is free to name someone other than the immediate physical custodian. *Ibid.*; see *Vasquez*, 233 F.3d at 695-696. This case involves such a challenge; and the proper respondent therefore is Padilla's immediate custodian, Commander Marr.[8]

B. A Habeas Court Cannot Reach Respondents Located Beyond The Court's Territorial Jurisdiction

The habeas laws confine a district court to issuing the writ within the territorial boundaries of the judicial district. 28 U.S.C. 2241(a). Because Padilla's immediate custodian, Commander Marr, is located in the District of South Carolina, the district court lacked jurisdiction over the amended petition.

[8] The court of appeals erred in relying (Pet. App. 16a) on *Ex parte Endo*, 323 U.S. 283 (1944). There, a Japanese-American detained in a California internment camp during World War II filed a habeas petition in a California district court, properly naming her immediate custodian as a respondent. The Court permitted the action to proceed notwithstanding that the government later moved her to Utah. *Id.* at 306-307. *Endo* is of no assistance to respondent in this case because the detainee there sought relief in the jurisdiction in which her immediate custodian was located, which is precisely what the habeas statutes require, and precisely what respondent failed to do here.

Indeed, because Secretary Rumsfeld is located in the Eastern District of Virginia, see *Monk*, 793 F.2d at 369 n.1, the district court would have lacked jurisdiction even if Secretary Rumsfeld were a proper respondent.

1. The terms of the habeas laws establish a strict territorial limitation on the reach of a district court's habeas jurisdiction, specifying that "[w]rits of habeas corpus may be granted by" the "district courts * * * *within their respective jurisdictions.*" 28 U.S.C. 2241(a) (emphasis added). That express territorial constraint originated in Congress's 1867 revision of the habeas laws. § 1, 14 Stat. 235.

Congress added the language confining district courts' habeas authority to "their respective jurisdictions" to address concerns that, without the amendment, "a judge of a United States court in one part of the Union would be authorized to issue a writ of *habeas corpus* to bring before him a person confined in another and a remote part of the Union." Cong. Globe, 39th Cong., 2d Sess. 790 (1867) (remarks of Sen. Trumbull); see *Carbo* v. *United States*, 364 U.S. 611, 616-617 (1961). As this Court has explained, Congress thought it "inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Id.* at 617. The result is that the "Great Writ" is "issuable only in the district of [the challenged] confinement." *Id.* at 618; see *Al-Marri*, 2004 WL 415279, at *5; *Monk*, 793 F.2d at 369.

2. The court of appeals gave short shrift to the argument that Section 2241(a) requires a habeas petition to be brought in the district where the immediate custodian is located, *i.e.*, the district of the challenged confinement. See Pet. App. 21a-23a. According to the court of appeals, a district court's habeas jurisdiction extends to *any* custodian within reach of the court's process in an ordinary civil action, which is generally defined by the long-arm statute of the state in which the

court sits. *Id.* at 23a; see Fed. R. Civ. P. 4(k)(1)(A). That capacious understanding of habeas jurisdiction is flatly incompatible with the terms and purposes of the habeas statute.

a. If a habeas court's jurisdiction were defined by the reach of the state long-arm statute, district courts in every district with the requisite contacts with the custodian would have jurisdiction over a particular habeas action. Such overlapping and duplicative habeas jurisdiction is squarely foreclosed by the statutory restriction that district courts may issue the writ only "within their respective jurisdictions." 28 U.S.C. 2241(a). Indeed, Congress's entire purpose in adding that language was precisely to foreclose a district court from issuing process beyond the district's territorial borders. Congress thus required in Section 2241(a) that a habeas action be brought in the district of the challenged confinement. See *Carbo*, 364 U.S. at 616-618.[9]

The habeas laws elsewhere reinforce the conclusion that there is only one district court with territorial jurisdiction in any given habeas case. The statutes prescribe that the "Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application * * * to *the* district court having jurisdiction to entertain it." 28 U.S.C. 2241(b) (emphasis added). To the same effect, a habeas application "addressed to the Supreme Court, a justice thereof or a circuit judge" must "state the reason for not making application to *the* district court of the district in which the applicant is held." 28 U.S.C. 2242 (emphasis added). The Federal Rules likewise provide that an "application for a writ of habeas corpus must be made to *the* appropriate district court." Fed. R. App. P. 22(a) (emphasis added).

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[9] See also Cong. Globe, 39th Cong., 2d Sess. 790 (1867) (remarks of Sen. Johnson) (observing that addition of phrase "within their respective jurisdictions" addresses "practical evil" that would result if a habeas court could "issue process [that] extends all over the Union").

Conversely, when Congress intends to vest habeas jurisdiction in more than one district court, it does so explicitly. For instance, the habeas statutes provide that when the petitioner is "in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed" not only "in the district court for the district wherein such person is in custody," but also "in the district court for the district within which the State court was held which convicted and sentenced him," and "each of such district courts shall have *concurrent jurisdiction* to entertain the application." 28 U.S.C. 2241(d) (emphasis added). That provision would have been unnecessary if the court of appeals' understanding of the scope of habeas jurisdiction were correct. See *Al-Marri*, 2004 WL 415279, at *3.[10]

b. The court of appeals assumed that a habeas court remains "within [its] respective jurisdiction[]" under the habeas statutes (28 U.S.C. 2241(a)) as long as the Federal Rules of Civil Procedure would permit the court to reach the respondent in a general civil action. See Pet. App. 23a. That approach confuses the basic question of statutory jurisdiction with the separate issue of the procedures for service of process. See *Al-Marri*, 2004 WL 415279, at *3. The Federal Rules themselves make clear that they do not "extend or limit the jurisdiction of the United States district courts." Fed. R. Civ. P. 82; accord *Kontrick* v. *Ryan*, 124 S. Ct. 906, 914 (2004). And with respect to habeas jurisdiction in particular, the Rules provide that they apply in habeas proceedings only "to the extent that the practice in such proceedings is not set forth in statutes of the United States." Fed. R. Civ. P. 81(a)(2). As a result, the Federal Rules can-

[10] The same conclusion follows with respect to 28 U.S.C. 2255, which was added to enable federal prisoners to bring post-conviction challenges in the sentencing court rather than in the district of confinement. See *United States* v. *Hayman*, 342 U.S. 205, 212-219 (1952).

not alter the territorial constraint established by Congress in Section 2241(a).

This Court made the point clear in *Schlanger* v. *Seamans*, 401 U.S. 487 (1971). After reaffirming that "jurisdiction over [a habeas] respondent [is] territorial," *id.* at 490, the Court held that the territorial constraint on district courts was unaffected by the enactment of 28 U.S.C. 1391(e), the statute providing for nationwide service of process against federal officials. The Court explained that the statute "was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia," but there was no "indication that Congress extended habeas corpus jurisdiction." 401 U.S. at 490 n.4. If a federal *statute* providing for nationwide service of process fails to relax the territorial limits on habeas courts, a federal *rule* providing for service of process under long-arm statutes necessarily leaves those territorial constraints unaffected.[11]

c. Contrary to the court of appeals' view (Pet. App. 22a-23a), nothing in this Court's decisions in *Braden* or *Strait* suggests that the district court could venture beyond its territorial jurisdiction to reach respondents located elsewhere. In *Braden*, because the challenge was to the petitioner's legal custody under the Kentucky detainer, the relevant custodian was located in Kentucky, and the petition was filed in Kentucky. Although the Court observed that habeas jurisdiction lies "[s]o long as the custodian can be reached by service of process," 410 U.S. at 495, the Court went on to explain that "the respondent was properly served *in that district*," *i.e.*, within the district's territorial boundaries, *id.* at 500 (emphasis added). *Braden* thus had no occasion to consider service against custodians located outside the judicial

[11] The court of appeals' evisceration of the territorial constraints on habeas jurisdiction not only is foreclosed by the statute, but it creates the potential for "one idiosyncratic district or appellate court anywhere in the nation [to] insist that the entire federal government dance to its tune." *Al-Marri*, 2004 WL 415279, at *3.

district in which suit was brought. See *Al-Marri*, 2004 WL 415279, at *5 ("Braden sued his Kentucky custodian in Kentucky, just as § 2241(a) provides."); see also *Guerra* v. *Meese*, 786 F.2d 414, 417 (D.C. Cir. 1986) ("The *Braden* decision in no way stands for the proposition * * * that federal courts may entertain a habeas corpus petition when the custodian is outside their territorial jurisdiction.").

Strait, as explained, involved an unattached reservist not subject to physical confinement. The Court permitted the petitioner to file in California, where he resided and "where he had had his only meaningful contact with the Army." 406 U.S. at 343. The Court found that it would "exalt fiction over reality" to require him to seek relief in Indiana, the location of the "nominal custodian" who held his records, and where the petitioner had never been. *Id.* at 344. Because *Strait* permits filing where the effects of custody in fact were felt by the petitioner, the decision provides no authority for extending jurisdiction beyond the district of custody, particularly in a case involving physical confinement rather than a mere "nominal" custodian. See *Al-Marri*, 2004 WL 415279, at *5; *Vasquez*, 233 F.3d at 695 n.6.[12]

Consequently, neither *Strait* nor *Braden* affect the statutory restriction that district courts may issue the writ only "within their respective jurisdictions." 28 U.S.C. 2241(a). That provision forecloses the district court's assertion of habeas jurisdiction in this case.

[12] This Court's decision in *Endo*, like *Braden* and *Strait*, refers to service of process, see 323 U.S. at 307, but as explained (note 8, *supra*), *Endo* involved a petition initially filed within the territorial jurisdiction of the district of detention. When the detainee was subsequently moved, the court where the petition was initially and properly filed did not lose jurisdiction.

II. THE PRESIDENT HAS AUTHORITY AS COMMANDER IN CHIEF AND PURSUANT TO CONGRESS'S AUTHORIZATION FOR USE OF MILITARY FORCE TO ORDER PADILLA'S DETENTION AS AN ENEMY COMBATANT

The President, explicitly invoking both his constitutional authority as Commander in Chief and the authority recognized by Congress in its Authorization of Force, determined that Padilla is "closely associated with al Qaeda," has engaged in "hostile and war-like acts," and "represents a continuing, present and grave danger to the national security," and that it therefore "is in the interest of the United States" that Padilla be detained by the military as an enemy combatant. App., *infra*, 5a-6a. That determination was the product of a careful, thorough, and multi-layered process of review incorporating independent recommendations based on all available intelligence information and legal and policy analyses of, among others, the Central Intelligence Agency, the Department of Defense, the Department of Justice, the White House Counsel and, ultimately, the President of the United States. See 150 Cong. Rec. S2701, S2703-S2704 (daily ed. Mar. 11, 2004) (reprinting Feb. 24, 2004 remarks of Alberto Gonzales, White House Counsel, before the American Bar Association's Standing Committee on Law and National Security). The President's determination lies at the heart of his constitutional powers as Commander in Chief, and it is fully supported by Congress's broad grant of authority to the President. The court of appeals' decision setting aside a core wartime determination of the Commander in Chief was both unprecedented and fundamentally in error.

A. The Authority Of The Military To Seize And Detain Enemy Combatants In Wartime Is Well Settled

1. "This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over * * * enemy belligerents [and] prisoners of war." *Johnson* v.

Eisentrager, 339 U.S. 763, 786 (1950) (quoting *Duncan* v. *Kahanamoku*, 327 U.S. 304, 313 (1946)). The capture and detention of enemy combatants is an essential aspect of warfare, and represents a core exercise of the President's constitutional powers as Commander in Chief. Accordingly, the United States military has seized and detained enemy combatants in virtually every significant armed conflict in the Nation's history, including in the current conflict against al Qaeda. That settled historical practice is deeply rooted in the laws and customs of war.

As this Court recognized in *Ex parte Quirin*, 317 U.S. 1 (1942), the "universal agreement and practice" under the "law of war" holds that enemy combatants are "subject to capture and detention * * * by opposing military forces." *Id.* at 30-31. While all enemy combatants are subject to capture and detention for the duration of an armed conflict, the "law of war" draws a "distinction between * * * those who are lawful and unlawful combatants." *Ibid.* "Lawful" combatants, so named because they adhere to the conditions of lawful belligerency such as wearing fixed insignia and openly displaying arms, are immune from prosecution for their hostile acts and entitled to treatment as prisoners of war when detained. *Id.* at 31; see Pet. App. 127a. "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31; see *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003), cert. granted, 124 S. Ct. 981 (2004); *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946); *Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913).

2. The detention of enemy combatants serves two vital purposes directly connected to prosecuting the war. First, detention prevents captured combatants from rejoining the enemy and continuing the fight. See *Hamdi*, 316 F.3d at 465; *Territo*, 156 F.2d at 145. Second, detention enables the military to gather critical intelligence from captured combatants concerning the capabilities and intentions of the enemy. See J.A. 75-88 (Jacoby Decl.); see also Int'l Comm. of the Red Cross, Commentary III, Geneva Convention Relative to the Treatment of Prisoners of War 163-164 (Jean S. Pictet & Jean de Preux eds. 1960) ("[A] state which has captured prisoners of war will always try to obtain information from them."); United States Dep't of the Army, *The Law of Land Warfare*, Field Manual 27-10, ¶ 48 (1956) ("[T]he employment of measures necessary for obtaining information about the enemy and the country are considered permissible."). Those war-related purposes categorically distinguish the military's detention of enemy combatants in wartime from detention at the hands of civilian authorities. The detention of enemy combatants is "neither a punishment nor an act of vengeance," but is a "simple war measure." William Winthrop, *Military Law and Precedents* 788 (2d ed. 1920); see *Hamdi*, 316 F.3d at 465.

The intelligence-gathering function is especially critical in prosecuting the current conflict. As the September 11 attacks starkly illustrate, the enemy is composed of combatants who operate in secret and aim to launch surprise, sporadic, and large-scale attacks against the civilian population. The military estimates that intelligence collected from combatants seized in the current conflict has helped to thwart numerous potential attacks against the United States and its interests. See J.A. 82 (Jacoby Decl.). And in this case, the President determined not only that Padilla's detention as an enemy combatant is "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States," but also that Padilla "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces,

other governmental personnel, or citizens." App., *infra*, 5a-6a; see J.A. 84.

B. The Military's Authority To Detain Enemy Combatants Is Fully Applicable In The Circumstances Of This Case

1. The settled authority of the military to capture and detain enemy combatants fully applies to a combatant who is an American citizen and is seized within the borders of the United States. In *Quirin*, *supra*, this Court upheld the President's exercise of military jurisdiction over a group of German combatants who were seized in the United States before carrying out plans to sabotage domestic war facilities during World War II. Each of the eight saboteurs had lived in the United States at some point, and one was assumed to be an American citizen. 317 U.S. at 20. All of them affiliated with the enemy's forces and underwent training in Germany on the use of explosives. See *id.* at 21. They came ashore in the United States in two groups, the first arriving on June 13, 1942, and the second four days later. *Ibid.* They then proceeded in civilian clothing to various points, but were seized within days in Chicago and New York by FBI agents. *Ibid.* On July 2, 1942, the President, in his capacity as Commander in Chief, appointed a military commission to try the combatants for violating the laws of war, whereupon the FBI transferred custody over them to the military. *Id.* at 22-23.

The saboteurs sought habeas relief in this Court, contending that the President lacked authority under the Constitution and federal law to subject them to military detention and trial by commission, and that they were entitled to be detained as civilians and tried in the civilian courts. 317 U.S. at 24. The Court denied the saboteurs' claims. Of particular significance, the Court rejected their reliance on *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which had held that the military lacked authority to subject to trial by

military commission a citizen who was alleged to have "conspired with bad men" (*id.* at 131) against the United States during the Civil War. The *Quirin* Court found *Milligan* "inapplicable" to the circumstances before it, explaining that Milligan, "not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." 317 U.S. at 45. By contrast, because the *Quirin* saboteurs not only conspired to harm the United States but did so as persons associated with the enemy's forces, they were enemy combatants subject to military jurisdiction under the laws and customs of war. *Id.* at 45-46; see *id.* at 30-31, 35-38.

2. The Court's opinion in *Quirin* confirms the military's authority to detain Padilla as an enemy combatant. First, the Court held that the authority to detain an enemy combatant is undiminished by the individual's American citizenship. As the Court explained, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." 317 U.S. at 37. Rather, "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war." *Id.* at 37-38; accord *Colepaugh*, 235 F.2d at 432; *Territo*, 156 F.2d at 142-143. Padilla fits squarely within the Court's language: the President determined that Padilla is "closely associated with al Qaeda," that he has "engaged in * * * hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States," and that his detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." App., *infra*, 5a-6a.

In addition, the *Quirin* Court specifically rejected the suggestion that the saboteurs were "any the less belligerents if, as they argue, they have not actually * * * entered the theatre or zone of active military operations." 317 U.S. at 38.

There thus is no merit to respondent's submission (Br. in Opp. 16) that "there is a profound difference between" the circumstances of this case and the "historical practice of detention of prisoners of war on the field of battle." Respondent likewise errs in attaching significance to the fact that Padilla was "not engaged in imminent hostilities" at the moment of his initial seizure. *Id.* at 18. The *Quirin* Court found it immaterial that the combatants in that case had not "committed or attempted to commit any act of depredation" when they were captured. 317 U.S. at 38. Nor is it significant (see Br. in Opp. 18) that Padilla was initially seized and detained by civilian authorities before his transfer to military control. The combatants in *Quirin* similarly were seized by the FBI and detained by civilian authorities before the President ordered their transfer to military custody. 317 U.S. at 21-23.

Indeed, the factual parallels between *Quirin* and this case are striking. The *Quirin* combatants affiliated with German forces during World War II, received explosives training in Germany, entered the United States with plans to destroy certain of the United States' war facilities, and were seized by FBI agents in Chicago and New York. Padilla was in Afghanistan and Pakistan after the attacks of September 11, he engaged there in extended discussions with senior al Qaeda operatives about conducting terrorist operations in the United States, he researched explosive devices at an al Qaeda safehouse and received training on wiring explosives, he returned to the United States to advance the conduct of further al Qaeda attacks, and he was seized by law enforcement agents in Chicago. Pet. App. 169a-171a. The Court's conclusion in *Quirin* that the saboteurs were enemy combatants subject to military detention and jurisdiction thus is equally applicable in this case.

3. The court of appeals reasoned that *Quirin* "rested on express congressional authorization" that is absent here. Pet. App. 37a. The President's actions in this case, however,

are fully supported by Congress. See Section II.C., *infra*. Moreover, the provisions of the Articles of War discussed in *Quirin* and relied on by the court of appeals as a basis to distinguish *Quirin* in fact remain in effect today. *Quirin* focused on Article 15 of the Articles of War that were then in effect, which recognized the scope of the President's authority as Commander in Chief and provided for trial by military commission of offenses against the laws of war. See 317 U.S. at 28. The same provision is currently codified as Article 21 of the Uniform Code of Military Justice, 10 U.S.C. 821.

While the *Quirin* saboteurs were tried by commission pursuant to that provision, whereas no such charges have been brought against Padilla, the issue in *Quirin* was not merely whether the military had jurisdiction to try the saboteurs for violating the laws of war, but whether the military had authority to detain them in the first place. Accordingly, the Court framed the question in the case as whether "the *detention* and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—* * * are in conflict with the Constitution or laws of Congress." 317 U.S. at 25 (emphasis added); see *id.* at 18-19 ("question for decision is whether the detention of petitioners * * * for trial by Military Commission * * * is in conformity to the laws and Constitution of the United States").

The Court's opinion in *Quirin* likewise makes clear that the military's authority to try an enemy combatant for violating the laws of war necessarily includes the lesser authority to detain him in the course of the conflict. The Court explained that all enemy combatants "are subject to capture and detention * * * by opposing military forces," but that unlawful combatants are "*in addition* subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31 (emphasis added); see *Colepaugh*, 235 F.2d at 432. The Commander in Chief thus retains "the option to detain until the cessation of hostilities

* * * in either case," *Hamdi*, 316 F.3d at 469, and the overwhelming share of combatants detained in the course of a conflict are never charged with violations of the laws of war, see *id.* at 465. The President's authority to detain Padilla as an enemy combatant therefore follows "*a fortiori* from *Quirin*." Pet. App. 133a.[13]

C. The President's Exercise Of Commander-In-Chief Authority In This Case Comes With The Broad Support Of Congress

Quirin settles that the Constitution raises no absolute prohibition against the detention of an American citizen as an enemy combatant in the circumstances of this case. The court of appeals did not suggest otherwise. The court instead concluded that Congress alone possesses power to authorize the detention as an enemy combatant of a citizen seized on United States soil, and that Congress has not done so here, and indeed, has precluded it.

The court reasoned, in particular, that: (i) the President lacks independent authority as Commander in Chief to detain a United States citizen seized within the borders of the United States; (ii) Congress's Authorization of Force does not supply the requisite statutory predicate for the President's order in this case; and (iii) the provisions of 18 U.S.C. 4001(a) reflect Congress's determination that the detention of an American citizen as an enemy combatant is unlawful absent specific statutory authorization. The court's analysis is deeply flawed at every turn.

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[13] Respondent, like the court of appeals, would distinguish *Quirin* on the ground that the combatants in that case did not dispute their affiliation with the German forces. See Br. in Opp. 17; Pet. App. 39a. But the court of appeals in this case concluded that the President lacked authority to detain Padilla even *assuming* that, as the President's determination and the Mobbs Declaration elaborate, Padilla is closely associated with al Qaeda and trained with al Qaeda forces and then came to the United States intending to advance the conduct of further hostile actions by al Qaeda. The context in which this case comes to the Court thus precisely parallels the undisputed facts in *Quirin*.

1. *The President's Commander-in-Chief power squarely applies in the circumstances of this case*

Because the President's actions in this case are fully supported by Congress, the court of appeals' extended discussion of the President's independent powers as Commander in Chief (Pet. App. 29a-43a) is largely beside the point. But the Court seriously misconstrued the nature of the President's constitutional authority.

The Commander-in-Chief Clause grants the President authority to defend the Nation when it is attacked and to determine the appropriate military response. The President's exercise of that core Article II power is not conditioned on any action by Congress. Rather, "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He * * * is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). An essential aspect of the President's authority in that regard is determining the character of the military measures to be applied: "He must determine what degree of force the crisis demands." *Id.* at 670 (internal quotation marks omitted); see *id.* at 669-670.In short, "the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected." *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring), cert. denied, 531 U.S. 815 (2000); see *Eisentrager*, 339 U.S. at 789; *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827).

The court of appeals nonetheless held that the President lacks any inherent power to decide whether Padilla should be seized and detained as an enemy combatant, reasoning that the Commander-in-Chief authority is strictly confined in the "domestic sphere." Pet. App. 32a. The court rested its conclusion in large part (*id.* at 28a, 32a, 36a) on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). There,

President Truman ordered the Secretary of Commerce to seize and assume control over the Nation's steel mills based on concerns that a work stoppage could jeopardize the production of war materials for the Korean War. See *id.* at 582-583. The government acknowledged that the President had acted without support from Congress, *id.* at 586, and argued that the President's authority "should be implied from the aggregate of his powers under the Constitution," *id.* at 587, including in part the Commander-in-Chief power because of the potential implications for the availability of war materials. This Court disagreed. With respect to the government's reliance on the Commander-in-Chief authority, the Court found that the President lacked independent "power as such to take possession of private property in order to keep labor disputes from stopping production." *Ibid.* The Court deemed that a job for "lawmakers, not * * * military authorities." *Ibid.*

This case involves a decidedly different question. President Truman's order to seize the steel mills was not addressed to the military. The order instead called for action in the *civilian* sector in the form of a directive to the Secretary of *Commerce* to assume control over private industry. In sharp contrast, an order directed to the military to detain an individual as an enemy combatant is a quintessentially *military* measure concerning the military's actions towards the enemy's forces. And the military's actions vis-a-vis the enemy's forces lie at the core of the Commander-in-Chief authority. See *Quirin*, 317 U.S. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."); *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on

which the President as Commander-in-Chief * * * had the final say."). Because the authority to detain enemy combatants is part and parcel of the conduct of war, the logic of the decision below would hamstring the President's authority to respond to attacks on United States soil or to take action to deter such attacks.

The court of appeals' attempt to cabin the Commander-in-Chief authority to the conduct of combat operations on a traditional battlefield (Pet. App. 32a) is particularly ill-considered in the context of the current conflict. The President's power as Commander in Chief "is vastly greater than that of troop commander. He * * * has full power to repel and defeat the enemy; * * * and to punish those enemies who violated the law of war." *Hirota*, 338 U.S. at 208 (Douglas, J., concurring). The "full power to repel and defeat the enemy," contrary to the court of appeals' suggestion (Pet. App. 27a), is not confined to a "foreign battlefield." See *United States* v. *McDonald*, 265 F. 754, 764 (E.D.N.Y. 1920), appeal dismissed, 256 U.S. 705 (1921) ("With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations."). The September 11 attacks not only struck targets on United States soil; they also were launched from inside the Nation's borders. The "full power to repel and defeat the enemy" thus necessarily embraces determining what measures to take against enemy combatants found within the United States.

As the September 11 attacks make manifestly clear, moreover, al Qaeda eschews conventional battlefield combat, yet inflicts damage that, if anything, is more devastating. Al Qaeda combatants assimilate into the civilian population and plot to launch large-scale attacks against civilian targets far from any traditional battlefield. Confining the President's authority to traditional combat zones thus would substantially impair the ability of the Commander in Chief to engage and defeat the enemy's forces. The President's authority

under Article II should not "be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times," but should be given the "scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism." *Youngstown Sheet*, 343 U.S. at 640 (Jackson, J., concurring). The Commander in Chief therefore has authority to seize and detain enemy combatants wherever found, including within the borders of the United States.

2. The President's actions in this case are fully supported by Congress's Authorization for Use of Military Force

Although the President's decision to detain Padilla as an enemy combatant falls squarely within his Commander-in-Chief power, that question is not directly at issue here in light of Congress's specific authorization of military force against the forces responsible for the September 11 attacks. Congress's Authorization of Force supplies an ample statutory basis for the President's decision to seize and detain Padilla as an enemy combatant. Because "the President act[ed] pursuant to an express or implied authorization from Congress," his power is at its maximum, and its exercise is "supported by the strongest of presumptions." *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet*, 343 U.S. at 635 (Jackson, J., concurring)); accord *Hamdi*, 316 F.3d at 467.

a. Congress recognized virtually unanimously in its Authorization of Force that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Preamble, 115 Stat. 224.[14] With that explicit recognition of the

[14] The vote in favor of the Authorization of Force was unanimous in the Senate, while only one Congressman cast a vote against the Authorization in the House. See 147 Cong. Rec. H5683, S9421 (daily ed. Sept. 14, 2001).

President's broad constitutional powers as a guidepost, Congress authorized the President "to use *all* necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, * * * in order to prevent *any* future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a), 115 Stat. 224 (emphasis added).

Because seizing and detaining enemy combatants has long been recognized as an essential part of warfare, the authority to use "all necessary and appropriate force * * * to prevent any future acts of international terrorism against the United States" (§ 2(a), 115 Stat. 224) necessarily embraces the capture and detention of enemy combatants. See *Hamdi*, 316 F.3d at 467; cf. *Moyer* v. *Peabody*, 212 U.S. 78, 84-85 (1909) (construing statute granting authority to "repel or suppress" an invasion as necessarily encompassing "the milder measure of seizing the bodies of those * * * consider[ed] to stand in the way of restoring peace").

That conclusion is fortified by the terms of 10 U.S.C. 956(5), which authorize the military to use appropriated funds for "the maintenance, pay, and allowances for prisoners of war" and "other persons in the custody of the [military] whose status is determined by the Secretary to be similar to prisoners of war," as well as "persons detained in the custody of the [military] pursuant to Presidential proclamation." "It is difficult if not impossible to understand how Congress could" authorize the use of funds "for the detention of persons 'similar to prisoners of war' without also authorizing their detention in the first instance." *Hamdi*, 316 F.3d at 467-468.[15]

[15] The court of appeals erred in discounting the relevance of 10 U.S.C. 956(5) based on *Endo*. See Pet. App. 54a. *Endo* found that a "lump appropriation" in World War II for the "overall program" of the War Relocation Authority did not amount to ratification of the particular aspect of

b. The court of appeals determined (Pet. App. 52a) that the Authorization of Force "contains nothing authorizing the detention of American citizens captured on United States soil," even going so far as to conclude (*id.* at 51a) that the Authorization "contains no language authorizing detention." That reading is insupportable.

The court's conclusion that the Authorization of Force fails to authorize detentions under any circumstances strains credulity. The detention of enemy combatants is an inherent part of warfare and thus is necessarily encompassed by the authorization to use "all necessary and appropriate force." § 2(a), 115 Stat. 224; see Pet. App. 70a-71a (Wesley, J., dissenting) ("It would be curious if the [Authorization of Force] authorized the interdiction and shooting of an al Qaeda operative but not the detention of that person.").

There also is no basis for reading the broad language of Congress's Authorization to contain an unstated exception for enemy combatants captured within the United States. Congress recognized the President's authority to "take action to deter and prevent acts of international terrorism against the United States," and Congress specifically noted that it was "necessary and appropriate that the United States exercise its rights * * * to protect United States citizens both *at home* and abroad." Preamble, 115 Stat. 224 (emphasis added). Indeed, Congress was acting in direct

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the Authority's programs involving detention of concededly loyal citizens. See 323 U.S. at 303 n.24. The Court explained that "Congress may support the effort to take care of these evacuees without ratifying every phase of the program," and that "no sums were earmarked for the single phase of the total program which is here involved." *Ibid.* This case, by contrast, does not involve a lump sum appropriation, or even an appropriation at all. Instead, 10 U.S.C. 956(5) grants specific authorization for the military to expend appropriated funds on the detention of persons "similar to prisoners of war" and persons detained "pursuant to Presidential proclamation." 10 U.S.C. 956(5). That statute demonstrates Congress's specific and explicit understanding that the use of military force inherently entails the detention of enemy forces.

response to attacks that took place on United States soil and were initiated by combatants located within the borders of the United States. Congress cannot be assumed to have intended to withhold support for the use of force against forces identically situated to those that perpetrated the September 11 attacks. To the contrary, Congress recognized that the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," *ibid.*, and the enemy remains committed to launching further attacks within the Nation's borders, see note 1, *supra*.[16]

In addition, nothing in the Authorization of Force suggests that Congress sought to withhold support for the President's use of force against enemy combatants who are American citizens. Congress supported the President's use of force against "organizations" and "persons" that "*he determines*" were responsible for the September 11 attacks "in order to prevent any future acts of international terrorism" by those "organizations or persons." Preamble, 115 Stat. 224 (emphasis added). There is no suggestion of an intention to condition the President's use of force against persons "he determines" are associated with the enemy on a secondary determination of a person's citizenship. Indeed, whereas Congress broadly authorized the use of force against "persons" and "organizations," Congress specifically used the narrower term "citizen" elsewhere in the Authorization, recognizing that "acts of treacherous violence were committed against the United States and its citizens" on September 11 and that it is necessary to "protect United States citizens

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[16] The debates in Congress reflect the understanding that the President may be required to take action against the enemy within the Nation's borders. See 147 Cong. Rec. H5660 (daily ed. Sept. 14, 2001) ("This will be a battle unlike any other, fought with new tools and methods; fought with intelligence and brute force, rooting out the enemies among us and those outside our borders.") (remarks of Rep. Menendez); *id.* at H5669 ("We are facing a different kind of war requiring a different kind of response. We will need more vigilance at home and more cooperation abroad.") (remarks of Rep. Velasquez).

both at home and abroad." *Ibid.* Moreover, the "well-settled presumption [is] that Congress understands the state of existing law when it legislates," *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988), and *Quirin* established long ago that the military's authority to seize and detain enemy combatants fully applies to a United States citizen, including a citizen seized within the Nation's borders.

The court of appeals evidently would require Congress to have legislated to a level of detail so as specifically to have addressed the use of force against those enemy combatants who happen to be American citizens and are found within the United States. But Congress understandably saw the need to move expeditiously to express its support of the President within days of September 11; and even in less pressing circumstances, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act." *Dames & Moore*, 453 U.S. at 678. That is particularly true in the present context: "Such failure of Congress * * * does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Ibid.* (quoting *Haig* v. *Agee*, 453 U.S. 280, 291 (1981)).[17]

[17] The court of appeals relied (Pet. App. 52a) on this Court's statement in *Endo* that, "[w]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." 323 U.S. at 300. That observation has no application here. A conclusion that the Authorization of Force embraces the detention of enemy combatants does not require "implying" a power to impose a "greater restraint" than is authorized by the statute's "clear" and "unmistakable" terms. The Authorization broadly supports the use of "all necessary and appropriate force," § 2a, 115 Stat. 224, and the authority to detain enemy combatants therefore is necessarily encompassed by its *explicit* terms. Moreover, as Judge Wesley observed, the power to detain enemy combatants, while part and parcel of the use of force and thus expressly authorized by Congress, is a far lesser "restraint" than the authority to shoot them, which the Authorization also grants.

c. Even if there were any doubt on the scope of Congress's Authorization of Force, the President specifically found that his actions in this case were "consistent with" the Authorization. App., *infra*, 5a. There is no warrant for second-guessing the President's judgment in that regard. The court of appeals approached the issue of whether the President's actions are supported by Congress's Authorization as if it were confronting an abstract question of statutory interpretation in the first instance. But Congress wrote the Authorization of Force as an affirmative grant of authority to the President, expressly recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," Preamble, 115 Stat. 224, and entrusted the President with broad discretion to "use all necessary and appropriate force against" the forces that "he determines" were responsible for the September 11 attacks "in order to prevent any future acts of international terrorism against the United States by" those forces, § 2(a), 115 Stat. 224.

When Congress grants the President broad discretionary authority in that fashion, particularly in an area in which the President possesses independent constitutional powers, the courts can set aside the President's exercise of his authority as beyond the discretion conferred by Congress only in exceptionally narrow situations, if at all. See *Dames & Moore*, 453 U.S. at 678 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the Pre-

Pet. App. 70a-71a. *Endo* in no way suggests that an authority to detain is lacking in those circumstances. In fact, the Court specifically observed that the "fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking." 323 U.S. at 301. The Court found that a statute with the "single aim" of "protect[ing] the war effort against espionage and sabotage" did not support detention of a "concededly loyal" citizen, explaining that a person "who is loyal by definition [is] not a spy or a saboteur" and that "detention which has no relationship to" the statute's "objective is unauthorized." *Id.* at 300, 302.

sident broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'") (quoting *Youngstown Sheet*, 343 U.S. at 637 (Jackson, J., concurring)). Cf. *Dalton* v. *Specter*, 511 U.S. 462, 477 (1994) ("Where a statute * * * commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."). Those considerations are magnified in this case by the traditional reluctance of courts "to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988). Judged by those principles, there is no question that the President's decision to detain Padilla as an enemy combatant falls comfortably within the broad sweep of Congress's Authorization of Force.[18]

3. *Section 4001(a) does not constrain the military's detention of enemy combatants*

The court of appeals erred in concluding that Congress prohibited Padilla's detention in the provisions of 18 U.S.C. 4001(a). Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. 4001(a). Padilla's detention could not raise any potential issue under that statute, because the Authorization of Force is an "Act of Congress" that authorized the detention. See Section II.C.2, *supra*. In any event, as is made clear by Congress's purpose

[18] Respondent argues (Br. in Opp. 15 n.10, 18) that Padilla lies beyond the reach of the Authorization because Padilla *himself* did not "plan[], authorize[], commit[], or aid[] the terrorist attacks that occurred on September 11, 2001," § 2(a), 115 Stat. 224. That argument is specious. Congress supported the President's use of "all necessary and appropriate force" against, *inter alia*, "organizations" that "he determines planned, authorized, committed, or aided" the September 11 attacks. *Ibid.* Al Qaeda indisputably is such an "organization," and the President determined that Padilla is "closely associated" with al Qaeda and has engaged in "hostile and war-like acts," App., *infra*, 5a, bringing Padilla squarely within the sweep of the Authorization. See Pet. App. 68a-70a (Wesley, J., dissenting).

in enacting Section 4001(a), by the nature of the statute it repealed, and by the terms of its neighboring provisions, Section 4001(a) pertains solely to the detention of American citizens by *civilian* authorities. It has no bearing on the settled authority of the *military* to detain enemy combatants in a time of war.

a. Congress enacted Section 4001(a) in 1971. Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347. The explicit purpose was to repeal the Emergency Detention Act of 1950, former 50 U.S.C. 811-826 (1970). See 85 Stat. 348. Under the Emergency Detention Act, if the President declared an "Internal Security Emergency" due to an invasion, insurrection, or declaration of war, the Attorney General was authorized to detain persons for whom there were reasonable grounds to believe that they would engage in acts of espionage or sabotage. 50 U.S.C. 812(a), 813(a) (1970). Although the authority under the Emergency Detention Act had never been invoked, Congress sought to eliminate concerns that the Act could become "an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views." H.R. Rep. No. 116, 92d Cong., 1st Sess. 2 (1971). In addition, Congress was particularly concerned with avoiding a recurrence of the World War II program of detention camps for Japanese-American citizens. See *ibid.*; Pet. App. 47a.

In the court of appeals' view, because the Emergency Detention Act authorized the detention of suspected spies and saboteurs in times of invasion or war, and because the World War II detentions of Japanese-American citizens likewise constituted war-related measures aimed to curb espionage and sabotage, Section 4001(a) was intended to "limit[] military as well as civilian detentions." Pet. App. 47a. That is incorrect. Section 4001(a) "must be understood against the backdrop of what Congress was attempting to accomplish in enacting" it. *Reves* v. *Ernst & Young*, 494 U.S. 56, 63 (1990). And both the Emergency Detention Act and the World War II detentions of Japanese-Americans involved detention by

civilian authorities, not detention by the military under the laws of war. There is no indication that Section 4001(a) was intended to apply outside the context of civilian detentions.

The Emergency Detention Act assigned the detention authority to a civilian official, the Attorney General. See 50 U.S.C. 813 (1970). Moreover, the procedures for detentions under the Act—such as the requirement to obtain a warrant based upon probable cause and the provisions for administrative and judicial review—are characteristic of civilian detentions and did not involve the laws of war. See 50 U.S.C. 814, 819, 821 (1970).

The detention of Japanese-American citizens in World War II likewise was administered by civilian authority. As this Court explained in *Ex Parte Endo*, those detentions were conducted "by a civilian agency, the War Relocation Authority, *not by the military*." 323 U.S. 283, 298 (1944) (emphasis added).[19] In fact, the Court explicitly distinguished the circumstances in *Quirin*, observing that it was not confronting "a question such as was presented in * * * *Quirin*" concerning "the jurisdiction of military tribunals to try persons according to the law of war." *Id.* at 297. Because the case before it involved civilian rather than military detentions, the Court explained, "no questions of military law are involved." *Id.* at 298. Consistent with *Endo*, Congress recognized when enacting Section 4001(a) that the detention of Japanese-American citizens in World War II involved the exercise of civilian authority rather than military authority. See H.R. Rep. No. 1599, 91st Cong., 2d Sess. 7 (1970) ("It appears that the controlling impetus for taking such action was not in fact military, but civilian.").

b. Congress's focus at the time of enacting Section 4001(a) was limited exclusively to civilian detentions. By

[19] The War Relocation Authority was established within the Office for Emergency Management of the Executive Office of the President and was later transferred to the Department of the Interior. See *Endo*, 323 U.S. at 287, 290 n.4.

that time, *Quirin* had long settled that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." 317 U.S. at 37; see *Colepaugh*, 235 F.2d at 432; *Territo*, 156 F.2d at 142. While the legislative materials are replete with confirmation of Congress's intent to address civilian detention camps, like the ones instituted for Japanese-Americans in World War II, they do not address *Quirin* (or *Territo* or *Colepaugh*) or the military's established authority to seize and detain enemy combatants who are American citizens. If Congress had intended for Section 4001(a) to "override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit." *Hamdi*, 316 F.3d at 468.[20]

Congress reconfirmed its intention to speak solely to civilian detentions when it chose to place Section 4001(a) within Title 18, which concerns "Crimes and Criminal Procedure," and elected to add Section 4001(a) to a provision addressed to the control of the Attorney General over federal prisons. See 85 Stat. 347. Before the addition of Section 4001(a), 18 U.S.C. 4001 (1970) consisted of two paragraphs that are now renumbered as Sections 4001(b)(1) and (b)(2). *Ibid.* The terms of those provisions, which remain unchanged, stated then (as now) that the "control and management of Federal penal and correctional institutions, *except military or naval institutions*, shall be vested in the Attorney General." 18 U.S.C. 4001(b)(1) (emphasis added).

Section 4001 "should not be read as a series of unrelated and isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S.

[20] It was so clear that military detentions lay beyond Congress's consideration that, when the Department of Defense was asked to submit its views on various initial proposals for repealing the Emergency Detention Act, the Department elected not to comment, explaining: "Inasmuch as the Act is administered by the Attorney General, this Department defers to the Department of Justice as to the merits of the bills." H.R. Rep. No. 1599, *supra*, at 26.

561, 570 (1995). The most natural conclusion from Congress's decision to add Section 4001(a) to a provision addressing the Attorney General's control over federal prisons—and specifically excluding military institutions—is that Section 4001(a) likewise is directed solely to civilian detentions and has no bearing on the military detention of enemy combatants under the laws of war. A contrary conclusion "simply is not tenable in light of the * * * surrounding provisions." *Gade* v. *National Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 99 (1992).

c. The court of appeals deemed dispositive that the words of Section 4001(a), standing alone and without regard to the language of the neighboring provisions, contain no exception for detentions by the military under the laws of war. Pet. App. 43a-44a. But as this Court has reminded, "[l]ooking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 455 (1989). The court of appeals' reading of Section 4001(a) not only fails to square with Congress's intentions, but it also is "difficult to fathom." *Ibid.* Under the court of appeals' interpretation, Section 4001(a) would preclude the military's detention even of an American citizen seized while fighting for the enemy in the heat of traditional battlefield combat. Congress cannot be assumed to have intended that remarkable result. See *Hamdi*, 316 F.3d at 468.[21]

The court of appeals' construction would raise serious constitutional questions concerning whether Congress can constrain the basic power of the Commander in Chief to seize and detain enemy combatants in wartime. The canon of constitutional avoidance applies with added force when the "constitutional issues * * * concern the relative powers of coordinate branches of government." *Public Citizen*, 491 U.S. at 467; see *American Foreign Serv. Ass'n* v. *Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam). With particular respect to the Commander-in-Chief power, moreover, *Quirin* instructs that a "detention * * * ordered by the President in the declared exercise of his powers as Commander in Chief" is "not to be set aside by the courts without the *clear conviction* that [it is] in conflict with the * * * laws of Congress." 317 U.S. at 25 (emphasis added).

The substantial constitutional doubts raised by a construction of Section 4001(a) that would limit the President's authority as Commander in Chief to detain enemy combatants can be avoided in either of two ways. First, Congress's Authorization of Force can be construed consistent with its plain terms and the well-established principle that the authority to detain enemy combatants is part and parcel of the use of military force, thus supplying whatever statutory authority Section 4001(a) may require. Second, Section 4001(a) can be construed, consistent with its evident purpose, structure, and location in the Code, to limit detentions by civilian authorities but not to limit the authority of the military. The court below eschewed both of those saving constructions, adopting instead an unduly narrow construction of the Authorization and an unduly broad construction of Section 4001(a). That was error.

* * * * *

Because Section 4001(a) does not pertain to Padilla's detention as an enemy combatant, because Congress in any event broadly supported the President's actions through its Authorization of Force, and because the President has authority as Commander in Chief to protect the Nation against enemy combatants who infiltrate the borders of the United States, Padilla's detention is lawful.

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[21] This Court observed in a footnote in *Howe* v. *Smith*, 452 U.S. 473, 479 n.3 (1981), that Section 4001(a) "proscrib[es] detention *of any kind* by the United States" absent statutory authorization. But *Howe* involved civilian detentions, and the Court had no occasion to consider whether Section 4001(a) should be construed to apply to the very distinct context of the military's detention of enemy combatants.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded with instructions that the amended petition be dismissed for lack of jurisdiction. In the alternative, the judgment should be vacated and the case should be remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PAUL D. CLEMENT
Deputy Solicitor General
SRI SRINIVASAN
DAVID B. SALMONS
Assistants to the Solicitor General
JONATHAN L. MARCUS
Attorney

MARCH 2004

APPENDIX A

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force."

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—nothing in this resolution supercedes any requirement of the war powers resolution.

APPENDIX B

Section 4001 of Title 18 provides:

Limitation on detention; control of prisons

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

APPENDIX C

Section 956 of Title 10 provides:

Deserters, prisoners, members absent without leave: expenses and rewards

Funds appropriated to the Department of Defense may be used for the following purposes:

* * * * *

(5) Under such regulations as the Secretary concerned may prescribe, expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation.

APPENDIX D

TO THE SECRETARY OF DEFENSE:

Based on the information available to me from all sources,

REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;

(2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on

the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and

(7) it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.